BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;
AND IN THE MATTER OF the complaint by G. Michael Roosma and Robert Weller dated August 29, 1985 and September 5, 1985 respectively and amended October 31, 1986, alleging discrimination in employment on the basis of creed and constructive discrimination.

B E T W E E N:

Ontario Human Rights Commission

-and-

G. Michael Roosma
Robert Weller

Complainants

-and-

Ford Motor Company of Canada Ltd.
The National Automobile and Agricultural Implement Workers of Canada
CAW Local 707

Respondents

COSTS DECISION

Board of Inquiry:	Peter P. Mercer
Date:	January 25, 2001
Board File No.:	87-0004/5
Decision No.:	01-003-C

The hearing on costs proceeded by way of written submission.

My decision on the substance of the complaints in this matter was rendered in July 1995. In a further Interim Decision dated December 3, 1996, I determined that I should hear the respondents' motion for costs by way of written submissions. The respondents' written submissions were followed by the submissions of the Ontario Human Rights Commission eight weeks later and the respondents' reply submissions two weeks after that. Counsel for the Commission subsequently wrote to inform me "of two instances where the respondents' appeared to have made misleading factual assertions in their reply submissions" and counsel for the respondent Ford Motor Company responded to me in writing one week later, rejecting that claim.

The written submissions and supporting materials were extensive and I reviewed them at length. On the basis of my review, I concluded that the respondents' motion for costs should be denied. I wish to acknowledge my own contribution to the extraordinary delay in bringing this Inquiry to a close before explaining the particular circumstances.

In 1987, when I was offered appointment as the Board of Inquiry to hear these complaints, I was a full-time faculty member and Associate Dean (Academic) of The University of Western Ontario Faculty of Law. I was advised at that time, in response to my questions, that the hearing would have to be conducted in Toronto and that the Commission had requested that ten hearing days be booked. I accepted the appointment with that schedule in view but, from the very outset, events did not unfold as expected. The first few days of hearings were consumed by arguments on preliminary objections

and the hearing was then adjourned pending the release of the first of many written Interim Decisions, dated 20 November 1987.

Further deferment of the hearing was granted in order to give the respondents the opportunity to consider appealing my Interim Decision which they did in December 1987. The effect of the appeals was automatically to stay the Inquiry until they were disposed of by the Ontario Divisional Court in August, 1988. Six months after that, I was appointed Dean of The University of Western Ontario Faculty of Law and I subsequently moved to other positions in the Senior Administration of the University.

In effect, the developing nature of this Inquiry, which ended up taking eight times as many hearing days as originally contemplated and which was punctuated by numerous interim written decisions and which generated thousands of pages of documents, became difficult for me to manage as my other responsibilities grew. Except for portions of my holidays, which I regularly used for this purpose, I usually could only devote occasional single days for hearings and my schedule had to be reconciled not only with my other responsibilities but with the schedules of the two complainants, the two counsel for each of the Commission, the respondent company and the respondent union and, frequently, their advisors as well as those likely to be called as witnesses.

Furthermore, the parties had made clear to me the significance of this case from their respective points of view. The Commission, and both respondents in turn, indicated clearly from the outset that they expected my decision would be appealed and I therefore

took care to set out not only the basis for my final decision on the substance of the complaints but also my numerous Interim Decisions throughout. I very much regret the extent to which my own schedule and responsibilities and the accumulated weight of the proceedings, contributed to the delay.

I also want to clarify how I saw my role as a single member Board of Inquiry. On several occasions during the hearing, I stated that I considered it my responsibility to allow counsel to present their cases. While I dealt with dozens, probably hundreds, of objections on procedural and evidentury matters, I generally gave latitude to counsel to present their cases as they saw fit and as they urged me to do in this relatively novel context. Counsel for both respondents, were clearly irritated, at several points in the proceedings, with the style and duration of presentation and cross-examination by counsel for the Commission and I was urged on more than one occasion to exercise greater control. I did so only infrequently and reluctantly both because Commission Counsel objected that their methods were appropriate and necessary and because I, as the Board, generally had very little information on which to act. As the Divisional Court noted (albeit in another context) in its August, 1988 decision on the motion to quash the appeals launched by the respondents, "abusive process, although always maddeningly obvious to opposing Counsel, is, in my experience, unfortunately not always so easily apparent to judges"; *Roosma v. Ford Motor Co. of Canada Ltd.*, [1988] 53 D.L.R. (4^{th}) 90 at 99.

DECISION

Section 41(4) of the Ontario *Human Rights Code,* ("the *Code*") provides:

> Where upon dismissing a complaint, the Board of Inquiry finds that:
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> (a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
> (b) in the particular circumstances, undue hardship was caused to the person complained against,
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> the Board of Inquiry may order the Commission to pay to the person complained against such costs as are fixed by the Board.

Both the respondent company and the respondent union argue that the complaints carried forward by the Commission in this case were trivial and frivolous and that, as the "persons" complained against, they were caused undue hardship. The union also contends that both complaints carried forward against it were vexatious. Bad faith is not alleged.

A Board's power to award costs contrasts significantly with that of a civil court under section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43:

> 131.-(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Ordinarily, a successful civil defendant will recover costs from the plaintiff but factors that may be considered by a civil court are prescribed by rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194:

> 57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,
>
> (a) the amount claimed and the amount recovered in the proceeding;
> (b) the apportionment of liability;
> (c) the complexity of the proceeding;
> (d) the importance of the issues;
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the direction of the proceeding;
> (f) whether any step in the proceeding was
> (i) improper, vexatious or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution;
> (g) a party's denial of or refusal to admit anything that should have been admitted;
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
> (i) commenced separate proceedings for claims that should have been made in one proceeding, or
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and
> (j) any other matter relevant to the question of costs.

The operation of these and similar rules for costs in civil matters was described by the Board in *Persaud v. Consumers Distributing Ltd. (No. 2)* (1993), 19 C.H.R.R. D/491 at 493:

> Canadian civil procedure has opted for a general rule of indemnity. It allows for those costs reasonably incurred throughout the litigation of the dispute, to be recovered by the successful party provided his/her conduct was appropriate throughout the procedure (G. Watson, W. Bogart, A. Hutchinson and R. Sharpe, Canadian Civil Procedure, 3d ed. (Toronto: Emond Montgomery Publications Limited, 1988) at 264-65).

A Board's authority to award costs is clearly limited to the categories and conditions specifically identified in section 41 (1) of the Code; these conditions have been described as the most restrictive in Canadian human rights legislation(see *Naraine v. Ford Motor Company (No. 1)* (1996), 24 C.H.R.R. D/457. The respondents bear the burden of

proving that the case fits one of the categories or conditions. Furthermore, the words of section 41 prescribe even then that the Board "may order the Commission to pay ... costs" so a cost order will not automatically follow. The Board must still decide whether to exercise its residual discretion to order costs, although I find compelling the respondent company's argument that "just as a complainant has a justified expectation of a remedy when the prerequisites of s. 41(1) are satisfied [viz. "where the board of inquiry, after a hearing, finds that a right of the complainant under part 1 has been infringed ... the board may, by order..."], a respondent has a justified expectation of an order of costs in its favour once the prerequisites of s. 41(4) are satisfied"(Company's reply submission, p. 2-3); for an extensive discussion on this point see *Grace v. Mercedes Homes Inc. (No. 2)* (1996), 27 C.H.R.R. D/381.

Whether the Complaint was Trivial, Frivolous or Vexatious

In *Pham v. Beach Industries Ltd.* (1982), C.H.H.R. D/4008 at D/4021, an Ontario Board identified the standard by which a complaint might qualify as trivial or frivolous.

> TRIVIAL : trifling; inconsiderable : of small worth or importance. In equity, a demurrer will lie to a bill on the ground of the triviality of the matter in dispute, as being below the dignity of the court.
>
> FRIVOLOUS : An answer is frivolous where it appears from bare inspection to be lacking in legal sufficiency, and where, in any view of the facts pleaded, it does not present a defense. Any pleading is called "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent ... A "frivolous appeal" is one presenting no justifiable question and so readily recognizable as devoid of merit on the face of the record that there is little prospect that it can ever succeed.

This standard, which I adopt, is difficult to reach. At the outset, it can apply only to the complaints and not to the approach taken by the Commission to the merits of the case or to the Commission's conduct. Given that the complainants lost their jobs, and that a *prima facie* case was found by me to have been made out against both the respondents, thereby triggering the duty to accommodate, there would not seem to be any basis for concluding that the complaints were trivial.

Similarly, the mere fact that I ultimately dismissed the complaints does not mean that they can reasonably be characterized as frivolous. As the Commission noted in its written submission (page 5, paragraph 11), I found it necessary to consider all the evidence presented to me before reaching my substantive decision in this case. I would not have needed to do so if the complaints were "readily recognizable as devoid of merit"; see *Pham, supra,* and *Barber v. Sears Canada Inc. (No. 4)* (1995), 24 C.H.R.R. D/85 at D/87. The evidence which I reviewed included a substantial amount produced by both respondents in defending against the *prima facie* case. Their own apparent conclusion that such a defense was necessary militates against a characterization of the complaints as trivial or frivolous.

The respondent corporation argues that the Commission, at the time it requested appointment of a Board of Inquiry in this case, knew, or ought to have known, "that accommodation in this case was not possible without undue hardship on the standard stipulated by the Supreme Court of Canada". Specifically, the Company alleges that in proceeding on the basis that the standard of undue hardship was higher than "mere

reasonableness", the Commission adopted a legal position that was "in flagrant disregard of the clear language of the Supreme Court of Canada" so that the complaints were "entirely lacking in legal merit and were 'trivial and frivolous'." (Corporate respondent's written submissions, pp. 9 and 10).

I cannot accept the Company's argument. Leaving aside initially the question of whether the Commission misconceived the legal test of "undue hardship" in 1987 when it requested a Board appointment, the Commission's authority to make such a request under section 36 of the *Code* arises where "the Commission fails to effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry". The complaints were within the jurisdiction of the Commission and no satisfactory resolution appeared otherwise achievable. Those circumstances made it appropriate for the Commission to request the appointment of a Board.

Concerning the matter of the Commission's alleged misconception of the legal test of "undue hardship", I agree with the Commission's submission:

> The Commission made its decision to request this Board...in 1987. Even if it were assumed in a factual vacuum that the Commission applied the wrong legal test for undue hardship in making that decision in light of 1997 law (which the Commission strenuously denies), it surely cannot be faulted for lacking the ability to predict...the directions which the law would take over the next decade.
>
> (Commission's written submissions, p.11)

Nor does it help the respondent company, or union, in light of the section 41(4) test, that they asserted the same evidence and basis of hardship during the Commission's investigation of the complaints, as I ultimately chose to base my substantive decision on. This does not by itself render the complaints either trivial or vexatious and it would run counter to the provisions of section 41(4), set out above, to conclude that costs should follow as a normal course if a respondent is successful before the Board on grounds raised during the investigation.

Whether the Complaint is Vexatious

In *Wellington v Brampton (City) Community Services Dept. (No. 2)(*1995), C.H.R.R. N.P/96-146, the Board reviewed a number of human rights decisions and concluded as follows:

> I believe the cases show that "vexatious" includes an absence of *bona fides* by the person whose conduct is being scrutinized. That lack of *bona fides* can be discerned from a number of factors possibly including the absence of a substantial legal basis for the proceeding, so that either there was knowledge or there ought to have been knowledge that the claim was baseless, leading to a conclusion that the proceeding began or continued solely to harass the other party (p. 69).

Quoting the Third College Edition of *Webster's New World Dictionary*, the popular meaning of "vexatious" identified by the Board in the *Wellington* case is "instituted without real grounds, chiefly to cause annoyance to the defendant". These complaints were not instituted to annoy the respondents; they were instituted in good faith by the complainants Roosma and Weller.

The respondent union alleges that "[a] proper investigation would have made it abundently clear to the Commission that the complaints were frivolous and vexatious in the sense of having no legal or factual merit" (union written submission, p. 7). That is not the proper test of whether a complaint is vexatious. As the Board observed in *Wellington* "it is not enough that the basis of the complaint be unsupported by the necessary legal foundation. The point that seems to have been missed by many Boards is that to be vexatious, the complaint must also be pursued in bad faith as it is a species of bad faith." Whether that additional element is best described as a "species of bad faith" can be debated since the words "or made in bad faith" follow immediately in paragraph 41(4)(a); nevertheless, I accept that there must be some additional element of improper motivation which is lacking in this case.

Whether, in the Particular Circumstances, Undue Hardship was Caused

In *Elkas v. The Blush Stop Inc.* (unreported Ontario Board of Inquiry decision, 94-024C, dated September 6, 1994) the Board relied on the definition of "undue hardship" found in the Compact Oxford Dictionary and adopted in *Jerome v. DeMarco (No.3)* (1993), 20 C.H.H.R. D/15 at D/17:

> Undue: Not in accordance with what is just or right; unjustifiable ... not appropriate or suitable.
>
> Hardship: Quality of being hard to bear; painfully difficult.

The Company argues that "the hardship and expense of the protracted Board proceeding was "undue" because it was completely unwarranted, unjustifiable and not in accordance with what is just or right. The costs imposed on the Company were "undue" because they

would not have been incurred had the Commission applied the law clearly stipulated by the Supreme Court of Canada" (respondent Company's written submissions, pages 10-11). This argument is essentially the one put forward by the Company in respect of paragraph 4.(4)(a) whereby the Commission's alleged "flagrant disregard of the clear language of the Supreme Court of Canada" made the complaints "entirely lacking in legal merit" and, therefore, "trivial and frivolous". Again, I do not find the argument convincing.

The second ground of argument put forward by the respondents is that undue hardship was caused them because of the "vigour and zeal with which the Commission litigated the case, which had the additional effect of greatly and unnecessarily protracting the hearing" (Company's written submissions, page 12). The Union's position is especially forceful in this respect:

> It is also manifest that the time and arguments expended on the admissibility and relevancy of questionable documentation adduced or sought to be adduced by Counsel for the Commission, and which was not helpful to the result in this case, contributed significantly to the prolongation of the hearings. The transcripts are rife with the objections of the Respondents to the relevance of material sought to be introduced, and the wide-ranging and often irrelevant and harassing questions put to the witnesses by Commission Counsel.
>
> (Union written submissions, page 4)

As with the Company's argument, the Union's claim to have suffered "undue hardship" within the terms of paragraph 41(4)(b) sometimes merges with its claim under 41(4)(a). For example, at page 7 of its written submissions, the Union submits:

> ... that the Commission through its failure to properly investigate the extent of legal accommodation available, acted unreasonably and irresponsibly, and not in accordance with its statutory duty, when this resulted in the Respondents being subjected to lengthy and harassing hearings and heavy financial expenditures ... A proper investigation would have made it abundantly clear to the Commission that the complaints were frivolous or vexatious in the sense of having no legal or factual merit.

As indicated above, I do not find that the respondents have met the requirements of paragraph 41(4)(a); therefore, I must consider the further claims that the Commission's decision to pursue an Inquiry, despite having all the information concerning the Company's ability to accommodate, as well as the Commission counsel's conduct of the case visited undue hardship on the respondents.

The company contends that at the time it requested appointment of the Board of Inquiry, the Commission knew all the constraints on its ability to accommodate which I, in my substantive decision on this case, said were sufficiently clear that detailed enquiry was not necessary. According to the Company, "on the basis of ... the information the Commission possessed, it was abundantly clear that undue hardship existed on the standard stipulated by the Supreme Court of Canada." Again, this argument assumes that Canadian jurisprudence had clarified the duty to accommodate to the point that it should have been clear to the Commission that a Board would dismiss the complaints. However, the Supreme Court of Canada did not decide *Ontario Human Rights Commission and O'Malley v Simpson-Sears,* [1985] 2 S.C.R. 536 until after these complaints were laid and the Court's decision in *Central Okanagan School District No. 23 v Renaud,* [1992] 2 S.C.R. 970, its first on the issue of union responsibility to accommodate, was not released until oral argument in these proceedings was concluded. Furthermore, the complexity of

the case and the factual as well as legal issues still surrounding the appropriate standard for assessing not one but two complaints against a large employer and a union, do not support the claim that to bring the Inquiry forward itself causes hardship to the respondents.

The Company claims, at page 13 of its written submissions that "the Commission attempted to subject both Respondents' evidence to a microscopic examination that had the effect of greatly and unnecessarily prolonging the hearing" and "relies on the entire Record of the Board in this regard". The Union's submissions also stress the entire record of the Commission counsel's cross-examination of witnesses:

> As the Commission ... sought to accuse a multitude of persons of interfering in [the Complainant's] accommodation, it was necessary for the Union to call all of these persons to answer the accusations. They were then each aggressively and extensively cross-examined by Counsel for the Commission with a view to discovering the existence of any information, however miniscule, which might bear on the possibility of accommodation. The record attests to the detail and scope of Counsel's cross-examinations. The quality of his cross-examination was all too often relentlessly long and searching, repetitive and often irrelevant and vexatious. The record is replete with the objections of the Respondents.
>
> (Union written submissions, page 7-8)

Before reviewing the record of proceedings, I note the Company's references to the Ontario Divisional Court decision in *Ontario Human Rights Commission v. House* (1993), 115 D.L.R. (4th) 279 where, at page 285, the Court expresses the opinion that "the role of Commission counsel is analogous to that of the Crown in criminal proceedings".

The Court then quotes from the judgment of Sopinka J in *R. v. Stinchcombe,* [1991] 3 S.C.R. 326:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to bring before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime.

Sopinka J.'s further analogy to the effect that Crown counsel are to serve as "ministers of justice", and not as adversaries, was adopted by a Canadian Human Rights Tribunal as applicable to counsel for the Commission in *Dhanjal v Air Canada*, (1996) 28 C.H.R.R. D/367 at D/423.

In *Dhanjal*, the Human Rights Tribunal noted that the proceedings were particularly lengthy and laborious, that counsel had exchanged personal accusations and that it would therefore have been unfair to place all the responsibility for the hostility between counsel on the shoulders of Commission counsel. The Tribunal concluded, however that had Commission counsel "fully assumed the role of 'minister of justice' that was properly his before this Tribunal, [he] could have helped the inquiry to proceed expeditiously in an atmosphere relatively favourable to the proper administration of justice, while pursing his case vigorously and effectively. The Tribunal then quoted the remarks of Justice Rand in *Boucher v.The Queen,* [1955] S.C.R. 16, at D/423 as applying to Commission counsel charged with acting in the public interest:

> Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to it legitimate strength but it must also be done fairly. The role of prosecution excludes any notion of winning or losing; his function is a matter of public duty then which in civil life there can be none charged with greater personal responsibility.

The role of the Commission in Board of Inquiry proceedings is unusual, if not unique. The complaints were initiated by Mr. Weller and Mr. Roosma but carriage of the complaints, under s. 39(2)(a) of the *Code*, is the exclusive responsibility of the Commission. Therefore, counsel for the Commission is required to "step into the shoes" of the complainants by adducing evidence which supports their case and challenging the evidence put forward by the respondents. The proceeding before the Board of Inquiry is adversarial and therefore the posture adopted by counsel for the Commission must also be essentially adversarial. Counsel for the Commission acknowledges having argued the case forcefully but responsibly and avoiding behaviour that derogated from his "Minister of Justice" role. Thus, he submits, there was no attempt to "deliberately hide or suppress exculpatory evidence, or to seek to tender obviously irrelevant, prejudicial and inadmissible evidence ... or to voice personal opinions on the ultimate merits of the evidence... ." (Commission's written submissions, page 22). The Commission therefore places a different emphasis on the role that should be derived for Commission counsel by way of analogy with the Crown.

I agree that counsel for the Commission did not proceed unfairly, inaccurately or prejudicially in the sense described above. There is a second sense, however, in which the respondents claim that the Commission's conduct was unfair. This arises out of the alleged attempt by the Commission "to subject both Respondents' evidence to a microscopic examination that had the effect of greatly and unnecessarily prolonging the hearing". The Company's concluding submission concisely describes this alleged effect:

> The Commission's approach in this case was completely antithetical to the Code's objective of providing an expeditious and summary process. The result of the Commission's aggressive prosecution of this case is that the process of establishing [that] undue hardship exist[ed] itself becomes an undue hardship on Respondents.
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> (Company's written submissions, page 13).

The union's submissions concur, in effect, with this view.

The length and duration of the hearing in this case are surely a cause for concern and there may be little comfort in noting that other Inquiries have taken much longer. Nevertheless, the length of the hearing by itself does not justify an order of costs on the basis of undue hardship. Indeed, whereas the representatives of the respondents would expect to be reimbursed for any expenses incurred through attendance at the hearing, the complainants regularly attended without such support. Furthermore, there were, in effect, four claims, since both complainants named both respondents, and each claim raised a number of distinctive factual and legal issues allegedly arising over a period of several years. The respondents also required the Commission to prove the facts (although the Company did concede that a *prima facie* case had been made against it) including the sincerity of the complainants' religious beliefs. The hearing was therefore bound to be lengthy.

Ultimately, however, the respondents argue that over and above the legitimate causes for the hearing's length, the conduct of Commission counsel contributed unduly to its duration. Predictably, the Commission's written submissions counter with the claim that

"the hearing was in any event substantially protracted because of the conduct of both respondents at the hearing. If they suffered any hardship, they were the authors of their own misfortune." (Commission's written submissions, page 16). In recognition that the simple admonition, "a plague on all your houses", may not satisfy the requirement to give reasons for my decision, I will briefly review those features of counsels' conduct that are alleged to be objectionable.

It was apparent from the beginning of the hearing that feelings would run high among counsel. Counsel for the union, and to a lesser extent counsel for the company, clearly took some exception to being brought before the Board of Inquiry and counsel for the Commission were, by their deportment, often affronted in turn by the posture of respondent counsel. At a number of points in the lengthy proceedings, counsel for the Commission appeared to take the view that no axe was too small to grind and the frustration this caused to opposing counsel meant that the general tone of the hearing on several occasions went beyond the adversarial and took on more than a tincture of animosity. At several points in the hearing I pointed out the irony of spending what amounted to hours listening to counsel on each side excoriate the other for his prolixity.

My review of the proceedings confirms that I would assign the greater responsibility for unduly lengthening the hearing to Commission counsel. However, the respondents' counsel also bears some responsibility. I note, in particular, the challenge to the genuineness of the complainants' religious beliefs even though no doubt was expressed about them prior to the hearing and the similarly inapposite attempt to undermine the

doctrines of the World Wide Church of God as fundamentally undeserving of protection under the *Code*.

In its written submissions, the Commission lists other example of conduct by respondent counsel which, in its view, led to undue protraction of the hearing. Without accepting or even reviewing them, I will simply reaffirm that there were other aspects of respondent counsels' conduct which, in my view, were responsible for unduly lengthening the proceedings although, again, not to the degree that I would ascribe to Commission counsel.

Given the particular circumstances, I do not conclude that undue hardship was caused to the respondent company or to the respondent union. Although the hearing was lengthy and, no doubt, expensive for the respondents, its complexity largely justified the time it took and responsibility for otherwise protracting it unduly is widely shared. Even though that shared responsibility may be disproportionate, the respondents are demonstrably entities of considerable means and I do not find the hardship they experienced to be undue within the terms of section 41(4)(b).

Accordingly, I find that the respondents' claim for costs against the Commission should be denied.

Dated at London, Ontario, this 25th day of January, 2001

Peter P. Mercer, Board of Inquiry